S.M.C. Rest. Corp. d/b/a Poletti's Restaurant *and* Local 6, International Federation of Health Professionals, ILA, AFL-CIO *and* Vladimir Krull. Cases 2-CA-17482 and 2-CA-17546

April 23, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On November 4, 1981, Administrative Law Judge Benjamin Schlesinger issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, S.M.C. Rest. Corp. d/b/a Poletti's Restaurant, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Applying the standard for broad cease-and-desist orders established in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), we find that the Respondent's misconduct was sufficiently egregious and widespread as to demonstrate a general disregard for the employees' fundamental statutory rights. Accordingly, we adopt the Administrative Law Judge's recommendation of a broad cease-and-desist order.

DECISION

PRELIMINARY STATEMENT

BENJAMIN SCHLESINGER, Administrative Law Judge: This proceeding was heard by me on June 23-24 and July 20-22, 1981, in New York, New York, on a consolidated complaint which alleges that Respondent S.M.C. Rest. Corp. d/b/a Poletti's Restaurant violated Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*, by engaging, *inter alia*, in interrogation, threats of closure, and encouragement of employees to abandon their support of Local 6, International Federation of Health Professionals ILA, AFL-CIO (Union), once it learned in August 1980[1] that its employees had requested the Union to represent them; violated Section 8(a)(3) and (1) by laying off all its employees for 2-1/2 weeks commencing on August 16; and violated Section 8(a)(3) and (1) by engaging in other violations of employees' Section 7 rights during and after the layoff and by discharging employee Vladimir Krull, the leader of the employees' organizational efforts.[2] The complaint further alleges that Respondent refused to recognize the Union as the employees' representative in violation of Section 8(a)(5) and (1) and that Respondent's conduct is so serious that a bargaining order should issue pursuant to *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969).

Upon the entire record,[3] including my consideration of the briefs filed by the General Counsel and Respondent and particularly my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

I find, as Respondent admits, that it is a New York corporation with an office and place of business in New York, New York, where it is engaged in the operation of a public restaurant selling food and beverages. Respondent and J.L.W. Restaurant Inc. d/b/a Duff's Restaurant, also located in New York, which engages in the restaurant business, are affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy affecting employees of the two restaurants and have interchanged personnel with each other; and, by virtue thereof, they constitute a single integrated business enterprise and a single employer within the meaning of the Act. As such, they annually derive gross revenues in excess of $500,000 and have purchased and received at their facilities products, goods, and materials valued in excess of $50,000 from other enterprises within the State of New York which in turn receive products, goods, and materials directly from points outside the State of New York. I conclude, as Respondent admits, that it is and has been at all times material herein an employer within the meaning of Section 2(2), (6), and (7) of the Act.

Further, I conclude, as Respondent admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act and that the following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

[1] All dates herein refer to the year 1980 unless otherwise stated.

[2] The docket entries are as follows: The charge in Case 2-CA-17482 was filed by the Union on August 19 and was amended on September 18. The charge in Case 2-CA-17546 was filed by Krull on September 22. A consolidated complaint issued on October 31 and was amended in various respects at the hearing.

[3] Respondent moved to correct the official transcript in certain respects. There being no opposition, the motion is granted and the transcript is amended accordingly.

All full-time and regular part-time waiters, busboys, bartenders, cooks, salad people, general kitchen help, dishwashers, and porters employed by Respondent at its facility, but excluding all other employees, guards, and supervisors as defined in the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Statement; Credibility*

The following recital of facts is amalgam of the testimony of primarily employees Krull, Angel Maldonado, and Grant Hungerford and Respondent's Night Manager Salvatore DeLise, who generally corroborated the gist of much of the employees' testimony and admitted to conduct which occurred prior to the layoff which, there can be little doubt, violated the Act. I find that some of the dates and timing were inaccurately stated by some of the witnesses and, therefore, have followed the sequence of events which probability dictates. Further, although DeLise and General Manager Barbara Trocchia denied a number of the unfair labor practices occurring both before and after the layoff, I find, from the failure of Respondent's owner, James Wilcoxen, to testify and from the patently improbable and contradictory testimony of Trocchia about Respondent's motivation for the layoff, that the employees' narration of the events at issue was more truthful and have generally credited it.

B. *The Facts*

In the latter half of July, DeLise announced to the waiters and busboys that they would thereafter be required to pay 5 percent of their tips to management. Krull protested, but DeLise said that it was not up to him to decide. Employee Hungerford was chosen by the employees to speak to Wilcoxen; and, when that proved unsuccessful, Krull mentioned to the employees that perhaps their best course was to get a union to help them. Krull spoke to a union representative and, pursuant to his instructions, obtained signatures of the employees on a petition.[4] When he had obtained a sufficient number, he gave the petition to the union representative, who went to the restaurant on Monday, August 11, to see Wilcoxen. He was not in his office, but he saw Trocchia, told her that he was a union organizer, left his card, and asked her to have Wilcoxen call him. Having received no call by Tuesday, August 12, he sent a mailgram to Respondent demanding recognition.

When DeLise reported for work that day, Trocchia told him excitedly that a union organizer had come to the restaurant the prior day. DeLise stated that he found that "very strange" and that he would certainly like to find out about it. And, true to his word, he tried to; and thus, Respondent embarked upon a series of unfair labor practices, commencing with DeLise calling a meeting of his staff that afternoon at which he announced his knowledge of the Union and threatened that the employees were going to lose their jobs, that Wilcoxen was very rich and did not care if the restaurant closed, and that it would close unless the employees signed a petition against the Union.[5] DeLise questioned the employees as to why they wanted a union; and Krull answered that the employees wanted better benefits and the 5 percent of tips they would be losing. DeLise said that that was too little to concern themselves about—in any event, the restaurant did not make enough money, it could not afford a union, and Wilcoxen would not put more money into it.

The following afternoon, Wednesday, August 13, DeLise told Krull that he was against the Union and asked why Krull did not discuss the Union before he signed the petition. DeLise indicated his great surprise that Krull would seek the aid of the Union, stating that employee grievances could be settled without the petition, which made him look bad before the restaurant's management. In this same period of time, DeLise told Hungerford that he wished that the employees had come to him first so that he could advise them what "this really means" and told Hungerford that the employees had made a "big mistake."

On Thursday evening, another staff meeting was held. Respondent's attorney (not its present counsel) stated that the Union would not help the employees and that, if Respondent wanted to take a percentage of employees' tips, the Union could do nothing about it. Further, it was against the law for him to make any promises about benefits but he could do so if the employees signed a petition getting rid of the Union; and, if the employees were not satisfied with what Respondent then had to offer them, they could bring the Union back.[6]

A day later, Krull met with Wilcoxen in his office, at which waiter Orlando Ronchaquira and Trocchia were also present. Wilcoxen stated that he had called in the two employees because they had been employed the longest; and he restated his attorney's argument that, although he could not make promises to the employees, if they signed a petition denouncing the Union, he could discuss benefits. When Krull protested that changes in conditions of employment would not occur without the Union, Wilcoxen stated that the 5-percent deduction was to cover deductions made by credit card companies when customers charged tips and that the restaurant was not making enough money. Wilcoxen asked Krull and Ronchaquira to talk the other kitchen help into getting rid of the Union and stated that he would discuss benefits only after the petition was signed. He added that he could not afford a union, that the restaurant could not operate that way, and that he would have to close. Krull testified that, after this meeting, he told the other em-

[4] The petition stated: "We hereby designate Local 6, ILA, AFL-CIO as exclusive bargaining agent regarding wage, fringe benefits, and working conditions."

[5] This meeting was held the day before Respondent had received the Union's mailgram. Although there is no record evidence of how DeLise would have known that the employees had signed a petition, several employees testified that DeLise also asked the employees to revoke their petition. It is unnecessary to decide whether their testimony was accurate.

[6] Trocchia testified that the meeting was called only for the purpose that the attorney could advise the employees that he could not talk to them because they had a union. Why the employees would be collected together so that they could be informed that they could not be talked to was unexplained and unexplicable. I do not credit her.

ployees what Wilcoxen wanted and that, if the employees wanted to do so, they could sign the petition.[7]

Although I have some reservations about Krull's narration of this meeting, which was not corroborated by Ronchaquira, I am mindful that, although Trocchia denied these threats and promises, her testimony was not corroborated by Wilcoxen who, unlike Ronchaquira, did not testify herein. The claim of Krull that Wilcoxen explained Respondent's decision to deduct 5 percent (not mentioned by Trocchia) is entirely reasonable. Finally, notwithstanding Trocchia's denial of the threat to close, I find that such threat was made (especially since DeLise conceded that he made such a threat at the first meeting) and credit Krull's narration in its entirety, particularly because the threat was effected the following night by the closing of the restaurant, allegedly for vacation.

Earlier that Saturday, the employees set the tables in the dining room and served the customers and, at the end of the evening, they commenced cleaning the tables, just as usual. But, different from other nights, Wilcoxen began removing pictures from the walls and taking them to his office downstairs, the bartenders began carrying liquor bottles from the bar to the office and, as employees were leaving, DeLise announced to them that they were to return to the restaurant on Wednesday to pick up their checks.

Thus, the restaurant closed, without notice and without the employees being advised that the closing was neither permanent nor temporary not unrelated to Respondent's threats of the past 4 days. To the contrary, Hungerford was told by DeLise that the restaurant was closing and that, when he came for his check on Wednesday, he would see if anything had changed at that time. Respondent contends that the closing was merely for vacation and to make various necessary repairs and cosmetic alterations to the restaurant. These reasons are mere afterthoughts in an attempt to conceal what is a patent violation of Section 8(a)(3) of the Act. It is true that the kitchen was painted, stalls in the dining room were cleaned and waxed, and other miscellaneous work was done during the 2-1/2 weeks the restaurant remained closed, but in no event was the closing intended for such purpose. DeLise admitted that he was advised of the closing only that Saturday evening, in direct contradiction to Trocchia, who stated that she had advised DeLise days before. Only after Wilcoxen had told him of the decision did DeLise suggest that, as long as the restaurant would be closed, there were certain tasks that could be accomplished during that period; and it was only then that Wilcoxen agreed.[8] No materials had been purchased specially for the repairs before Wilcoxen's decision was made; and it was only later that DeLise purchased the supplies necessary to do the nominal work that was eventually performed.[9]

Trocchia's testimony is further at odds with DeLise's regarding whether the restaurant business was slow in August. She said it was, citing figures from the 2 prior years (but not producing documentary proof thereof). Conspicuously absent from her testimony was that business was slow in August 1980, the material period, and I credit DeLise and most of the employees who testified that business was normal. Finally, Trocchia attempted to justify the closing on the ground that, in addition to the needed repairs, she and Wilcoxen badly needed a vacation.[10] Yet, that was never announced to the employees in advance of the closing; indeed, a "vacation" was not mentioned to them late that Saturday evening when they were told to pick up their checks the following Wednesday. If the closing were as innocent as Trocchia stated, surely it is probable that the closing of the restaurant and the duration of the closing would have been announced beforehand. That was not done, leaving the factual pattern in this proceeding with (1) union organization; (2) interrogation, promise of benefits, and threats to close because of the Union; and (3) closing of the restaurant which had never before been closed—all within 5 days—a pattern which smacks of a callous attempt to crush the employees' union activities in violation of Section 8(a)(3) of the Act. I so conclude.

During those 2 weeks, and even afterwards, Respondent kept up its pressures upon employees. In a telephone conversation with Krull, DeLise denied any knowledge of when the restaurant would reopen and asked Krull whether he knew, in an attempt, I find, to ascertain whether the employees were ready then to disassociate themselves from the Union. DeLise added that it was the employees' mistake to organize; that they should have consulted him first; and that he would like to find out who was the leader, although he thought he knew.[11]

When employees reported to the restaurant on August 20 for their pay, DeLise, not indicating anything about the future of the restaurant or their employment, asked the employees whether "anything had changed; if anyone had anything to say"—all in an effort to see whether the restaurant closing had had its desired effect of discouraging the employees' union support.

When DeLise paid Maldonado that day, he asked Maldonado (in the presence of both Trocchia and Wilcoxen) to talk the employees out of their union petition. Later, before the restaurant reopened, DeLise telephoned Maldonado and asked him to revoke the petition, noting that other employees were professional people who could get employment elsewhere, but Maldonado, as a busboy, could not.

Hungerford received two telephone calls from DeLise during the closing. On or about August 19, DeLise told

[7] The complaint alleges that at this meeting Wilcoxen interrogated employees regarding their sympathies for and activities on behalf of the Union. I find no evidence of any interrogation in this conversation and dismiss that allegation.

[8] I discredit DeLise's later testimony that he told Wilcoxen of the suggested alterations and repairs prior to Wilcoxen's decision to close the restaurant.

[9] Much of Trocchia's testimony on cross-examination was contrived and unsupported. In particular, I find that she falsely expanded on her allegation that outside contractors were consulted for estimates. Respondent failed to introduce any documents (contractor's estimates, receipts for materials and supplies) which might support some of its claims.

[10] Despite the urgent need for a vacation, Trocchia expanded upon her cleanup assignments while the restaurant was closed. In contrast, DeLise testified that Trocchia was rarely seen.

[11] DeLise denied that this conversation took place, testifying that he already knew that Krull was the leader. However, Hungerford's earlier representation of employees' grievances also pinpointed him as a "leader" and I do not find Krull's testimony improbable.

Hungerford that the employees had made a big mistake; that all they thought about was themselves; and that they did not realize that they were putting many people out of work. DeLise told Hungerford that he wanted to find out who was behind the union organizing drive. In a second call, DeLise asked who started the Union, got the petition, and spread it around. Hungerford apparently did not reply to DeLise's questions. Instead, he asked DeLise when the restaurant would reopen. DeLise said that he did not know.

Martin Vasquez, one of Respondent's three cooks, was called by chef Frank Magnotta, an admitted supervisor, asking him whether he would like to return to work when the restaurant reopened. Vasquez refused, unless he got a $25 raise. Magnotta relayed a message from DeLise for Vasquez to come to the restaurant and he would talk to the "boss." The three cooks, Vasquez, Julio Uzhca, and Raul Dominguez went to the restaurant before September 3 and met Magnotta, who stated that he had talked with the "boss" and that the cooks could get the raise they requested. They received the raise the first week that the restaurant reopened.

On September 3, when the restaurant reopened, Wilcoxen held a meeting of employees, to whom he stated that 5 percent would not be deducted from employees' tips; but there was now a real war, that the employees should prepare their "ass" for it, and that from now on the restaurant employees would no longer be permitted to eat desserts. DeLise admitted that he never denied employees' requests for desserts before, and denied that these threats were made. In light of Wilcoxen's failure to testify and deny these threats, I find a violation of Section 8(a)(1). For similar reasons, to wit, the failure of chef Magnotta to testify, I credit Vasquez' testimony that shortly after the restaurant reopened, Magnotta interrogated him about the signatories to the petition, to which Vasquez truthfully replied that he and the other two cooks signed it.

On September 16, Krull was fired. The testimony was in conflict as to what Krull did, but not as to what started the incident. Apparently, DeLise had an argument with Wilcoxen in his office and was told to take off for 2 days. DeLise went upstairs to the dining room and accused (according to Krull) Krull, who was setting up tables, and (according to DeLise) "these problems we've been having here" of causing him to be sent home. At any rate, threatening Krull, DeLise either grabbed Krull by the neck (Krull) or by the shoulders (DeLise) and shook him, stating that he would like to kill (Krull) or strangle (DeLise) him. DeLise then stopped his assault and walked toward the kitchen. According to Krull, DeLise went over to another employee, Theodora Michaels, and shook her. Wilcoxen then entered the dining room and DeLise had an argument with him, noting that Wilcoxen was using him, the backbone of the restaurant, to increase business and now Krull was getting him fired. Krull denied this, stating that he could not, as a waiter, fire a boss. Trocchia was then in the dining room and cursed Krull and told him to shut up. Krull told her to shut up and said that he had nothing to say to her. Trocchia made threatening motions toward Krull, who pushed her hands away. Wilcoxen came over and punched Krull on the head and ear 3–4 times. Krull ran away, while other employees and DeLise tried to restrain Wilcoxen. Out on the street, Krull called the police, filed charges against Trocchia and Wilcoxen for assault, and then went to the hospital for X-rays.

Trocchia's narration was entirely different. Hearing a commotion from the dining room, she came upstairs from the office, saw DeLise walking into the kitchen carrying a glass of water, and heard Krull hollering "crazy man . . . shit . . . madman." She told Krull to stop, that DeLise is the boss and Krull could not talk to him that way. Krull then cursed Trocchia, who raised her arm to protect herself; and Krull punched her in her ribs on her left side. She went backwards and hit a table. Trocchia recalled that somebody screamed, "He hit her. He hit her." and recalled that Wilcoxen went after Krull. It is Krull's physical attack upon Trocchia, an incident allegedly corroborated by Michael's testimony, that Respondent bases its defense that it did not violate Section 8(a)(3) of the Act by discharging him.

The resolution of these matters rests solely upon credibility. Krull's testimony is not wholly unsuspect. His dismissal of Michaels as an imposter who was never employed by Respondent is, I find, inaccurate. His filing of assault and battery charges against Trocchia, when he admitted that Trocchia never touched him, and his claim that DeLise attacked Michaels, when there is nothing in this record to indicate why DeLise should have done so, indicates some propensity of Krull to stretch the truth to suit his own needs. But, otherwise, his testimony was corroborated by other witnesses and even in many respects by DeLise. It is clearly not beyond Krull's temperament to curse and fight, but I found him more prone to assume a fawning manner to protect himself, rather than the violence of which he was accused.

Although there is little question that DeLise went after Krull—a violation of Section 8(a)(1)—there was no corrobration from Michaels that Krull struck Trocchia. Indeed, Trocchia and Michaels are hopelessly at odds. If Trocchia is to be believed, she was struck by Krull in her ribs on her left side and crashed backwards into a table. But Michaels saw less of a right hook, rather a wrestling match, with Krull, facing Trocchia and with his arms around her, beating her on her back just below her neck, blows which would certainly cause Trocchia to fall forward (although Michaels testified that Trocchia fell backwards). What is equally important to the determination of what happened is that Wilcoxen, who allegedly came to the "rescue" of Trocchia and, all agree, commenced punching Krull, never testified. Further, it was Krull who left the restaurant and summoned the police, claiming that he had been attacked by Trocchia and Wilcoxen. Respondent did not press a claim against Krull, from which I infer that Krull's actions were more placid than Respondent would now have me believe.

Finally, I note that Michaels was personally acquainted with Trocchia, who was a good friend of Michaels' fiancee, and received her job in part because of that relationship. Further, I generally discredit Trocchia, finding that her testimony about the closing of the restaurant indicates a general disregard for candor. Relating to the

September 16 activities alone, I discredit the testimony of both her and DeLise regarding why DeLise had been suspended for 2 days, a suspension, parenthetically, which was never carried out. According to both, DeLise's earlier argument with Wilcoxen arose from Wilcoxen's desire to take away DeLise's prerogative over the scheduling of employees. Why that argument would result in DeLise's blaming Krull or the union activities for his suspension will never be fully known, but it is probably that, contrary to both DeLise and Trocchia, union activities were the subject of that discussion and that DeLise was being asked to do something to Krull, to which DeLise took expection. Although I recognize that this is surmise, I find Trocchia's testimony in this regard improbable, and I am persuaded that her testimony about the assault was similarly inflated and that Krull did not punch her. I credit Krull that he feared that he was going to be attacked by Trocchia and that he merely pushed Trocchia in self-defense. That was seized upon, amplified, and exaggerated by Respondent as an alleged reason[12] to discharge Krull because of his union activities, in violation of Section 8(a)(3) and (1) of the Act.[13]

That Trocchia assaulted Krull is also complained of, a much closer question. I find that she did not. Krull admitted that she never hit him, but testified that she attempted to claw his eyes with her fingernails. If there were a physical skirmish, I find it not only quite minor indeed, but also never really intended by Trocchia, or Krull in defense, and dismiss this allegation of the complaint.

C. *Conclusions*

Otherwise, the allegations of the complaint have been fully proved. The activity engaged in by Respondent was flagrant and egregious. Although Respondent submitted a lengthy brief in defense of its actions, only a few issues require discussion, and brief discussion at that. Respondent argues that the interrogations and threats of closing engaged in by DeLise did not violate the law because they were, in essence, "friendly." That does not state Board law, which focuses on whether the interrogation may reasonably be said to have a tendency to coerce an employee in the free exercise of his rights under the Act. *El Rancho Market*, 235 NLRB 468 (1978), enfd. 603 F.2d 223 (9th Cir. 1979); *Quemetco, Inc., a subsidiary of RSR Corporation*, 223 NLRB 470 (1976).[14] And I know of no authority whatsoever that would condone a threat to close because it was "friendly." Indeed, coming from a "friend," the threat would appear to be all the more urgent and coercive, because employees would know that the threat was real.[15] I conclude that the interrogations and threats violated Section 8(a)(1) of the Act.

Respondent also argues that its increase of the cooks' wages did not violate the Act. However, as discussed *infra*, by August 13, Respondent was bound to bargain with the Union as to rates of employees' pay. Its unilateral grant of increases violates Section 8(a)(5) and (1) of the Act. *Hedison Manufacturing Company*, 249 NLRB 791, 823 (1980), enfd. 643 F.2d 32 (1st Cir. 1981).[16] It further violates Section 8(a)(1) of the Act because it was specifically intended to discourage the cooks' union adherence by buying them off. *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405 (1964). I reject Respondent's claim that the raise was necessary in order to ensure the cooks' return to work. The "return" was caused initially by Respondent's illegal closing of the restaurant.

Finally, Respondent argues that its encouragement of employees' revocation of union support is not an unfair labor practice. However, in each instance, Respondent's statements were accompanied by implied promises of benefits or threats of loss of jobs; as such, they violate Section 8(a)(1) of the Act.[17]

D. *The Gissel Bargaining Order*

Gissel, 395 U.S. at 613–614, permits the Board to order an employer to bargain with a union that has demonstrated majority strength prior to the commission of the unfair labor practices the order is meant to remedy. An order is appropriate only in "'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices" and "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." The General Counsel contends that this proceeding falls within these categories.

Respondent contends that the Union did not represent a majority of Respondent's employees. The parties stipulated that there were 23 employees in the appropriate unit, and Respondent does not question that eight signed authorization cards. Respondent argues, however, the lack of authenticity of cards purportedly signed by Jesus M. Figuereo, Manuel J. Lema, Orlando Ronchaquira, Juan A. R. Garcia, Cemo Capric, and Bruno Mikulian (whose signature, Respondent originally agreed was authentic). The General Counsel and Respondent each

[12] I am cognizant of *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), which requires the General Counsel to make a *prima facie* showing to support an inference that the protected union activities of the employee involved was a "motivating factor" in the employer's decision to discipline him, a showing which the General Counsel has overwhelmingly met. The Board holds that, at that point, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected or union activities. It is unclear, at present, what the Board requires in decisions of its administrative law judges when, as here, it is determined (notwithstanding Respondent's defense) that there was *no* reason for the discipline other than an illegal one. See, e.g., *American Tool & Engineering Co., Inc.*, 257 NLRB 608, fn. 4 (1981).

[13] Respondent's brief hints at a contention that Krull was not discharged, but left voluntarily. In light of DeLise's and Wilcoxen's attacks upon Krull, Krull had no reason to continue his employment and subject himself to further physical abuse. The actions of Respondent made it extremely uncomfortable for him to remain and constitute a constructive discharge.

[14] *N.L.R.B.* v. *K & K Gourmet Meats, Inc.*, 640 F.2d 460, 465 (3d Cir. 1981), is distinguishable. Here, the interrogations were accompained by threats of closing of the restaurant, clearly a "suggestion" of retaliation.

[15] Of course, subjective feelings as to whether employees are, in fact, threatened, are of no consequence.

[16] For the same reason, the unilateral elimination of the benefit of free desserts violates Sec. 8(a)(5) and (1) of the Act.

[17] Unlike *N.L.R.B.* v. *Monroe Tube Company, Inc.*, 545 F.2d 1320 (2d Cir. 1976), cited in Respondent's brief, the solicitation was made to almost all the employees and this record is replete with Respondent's unfair labor practices.

called expert witnesses, who predictably testified that the signatures were genuine and forgeries, respectively. On rebuttal, Lema and Ronchaquira testified that they signed the cards attributed to them.

The General Counsel's expert witness was by far more impressive, indicating with precision various peculiarities of the contested signatures which, when compared with known samples, demonstrated that the writing was of the same hand. By contrast, Respondent's expert witness emphasized the flow, fluidity, and rhythm of the writing to demonstrate differences, which he conceded might be affected by the conditions under which the employees signed the cards. Here, there was testimony that employees hurriedly signed petitions on an automobile and a wall, where ballpoint pens frequently run out of ink. That two of the individuals whose signatures Respondent's expert questioned ultimately testified that the signatures were, in fact, their own, contributes to my crediting of the General Counsel's expert. Finally, Krull, whom I credit, testified that he witnessed each of the employees' signatures; and my own examination of the sample signatures and those on the authorization cards persuades me that all six cards are genuine.[18] Accordingly, as of August 13, the date on which Respondent received the Union's demand for bargaining, the Union was authorized by 14 of Respondent's 23 employees to represent them.

There is one additional argument raised by Respondent regarding the Union's majority status. Certain employees (including Krull) may have been under the impression that they were designating another union representing restaurant workers, rather thar the Union herein. However, the record does not firmly establish this fact. Rather, I find that the record supports only the conclusion that the employees desired representation by a union which represented workers in restaurants so that they could obtain better benefits, and that is the reason they signed the cards which Krull gave them. *726 Seventeenth Inc., t/a Sans Souci Restaurant*, 235 NLRB 604, 608 (1978). In any event, whatever confusion there may have been ceased when, during the layoff, many of the employees went to the Union's office, spoke to its principals, and never indicated dissatisfaction with their representation by the Union and never revoked their authorization cards. I conclude that the Union represented a majority of Respondent's employees on August 13. *Burlington Industries, Inc., Kernersville Finishing Plant*, 257 NLRB 712 (1981); *Breaker Confections, Inc.*, 163 NLRB 882, 887 (1967), modified 402 F.2d 499 (4th Cir. 1968).

The propriety of a *Gissel* bargaining order turns on the facts in each case. Here, the employees' attempts to organize were quickly met with Respondent's speedy retribution. First, efforts were made through illegal interrogation to ascertain who and what caused the employees to seek the help of the Union. Respondent threatened closure of the restaurant and suggested that, if the employees abandoned their union support, it would consider granting benefits. When the employees failed to abandoned their union support and refused to adopt Respondent's suggestions, Respondent, without notice, closed the restaurant, giving no indication that the restaurant would reopen except if the employees abandoned their union support. When this did not work, Respondent reopened the restaurant but warned that the employees ought to watch themselves and that Respondent was no longer going to be an easy place to work. Finally, Respondent assaulted and discharged the principal union adherent.

There can be little doubt as to the seriousness of Respondent's conduct, much of which falls into what have been referred to as "hallmark violations" of the Act.[19] The threats to close involved the possibility of the direct loss of employment, *Gissel*, 395 U.S. at 619, one of the most flagrant means by which Respondent could have hoped to dissuade its employees from maintaining their union support and a threat which "lingers long after the utterances have been abated." *General Stencils, Inc.*, 195 NLRB 1109, 1110 (1972); *Gissel*, 395 U.S. at 611, fn. 31; *Chandler Motors, Inc.*, 236 NLRB 1565, 1566 (1978). In *N.L.R.B.* v. *Sinclair Company*, one of the four cases considered in *Gissel*, the Court upheld a bargaining order solely on the basis of threats to close the plant contingent on a union victory. In *Milgo Industrial, Inc.*, 203 NLRB 1196, 1200–01 (1973), enfd. 497 F.2d 919 (2d Cir. 1974), the Board cited *Gissel* for the proposition that threats of plant closure "are plainly actions which in and of themselves are egregrious enough under the rule of *Gissel* to come within the first category" of "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. 395 U.S. at 613. In *Jim Baker Trucking Company*, 241 NLRB 121, 122 (1979), the Board stated: "Since most employees are dependent on their jobs for their livelihood, threatening to eliminate their place of employment is sufficiently serious to justify a bargaining order, *even standing alone*." (Emphasis supplied.) See also *Ste-Mel Signs, Inc.*, 246 NLRB 1110 (1979); *Precision Graphics, Inc.*, 256 NLRB 381 (1981).

That the threat to close was effectuated by a 2-1/2-week layoff, of course, merely accentuates the need for a bargaining order. *Jensen's Motorcycle, Inc. d/b/a Honda of San Diego*, 254 NLRB 1248 (ALJD) (1981); *W & W Tool & Die Manufacturing Company*, 225 NLRB 1000, 1001 (1976), citing *Vernon Devices Inc.*, 215 NLRB 425 (1974). Finally, in no way has Respondent's conduct minimized the conduct in which it engaged. Rather, after the layoff, it warned that the restaurant was going to be a different place to work in and punctuated its threat with the assualt upon and discharge of Krull, the leading union adherent in this small unit. *Pay 'N Save Corporation*, 247 NLRB 1346 (1980), enfd. 641 F.2d 697 (9th Cir. 1981). I conclude that a bargaining order should issue, finding, in the words of *Gissel*, 395 U.S. at 614–615: "[T]he possibility of erasing the effects of [Respondent's] past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards

[18] Although I have some reservation about the signature of Figuereo, even if I found it invalid, my conclusion about Respondent's majority status would not be affected.

[19] See, e.g., *N.L.R.B.* v. *Chester Valley, Inc.*, 652 F.2d 263, 272 (2d Cir. 1981); *N.L.R.B.* v. *Jamaica Towing, Inc.*, 632 F.2d 208, 212–213 (2d Cir. 1980).

would, on balance, be better protected by a bargaining order . . . ."[20]

If the *threat* of a layoff is considered a most serious violation of employees' rights, the fact that the threat was carried out must be considered even more egregious. Surely, employees will henceforth be aware that not only does Respondent threaten retribution for their exercising Section 7 rights but also it is fully prepared to carry out its threats. The normal Board remedies are not adequate to cure the violations found herein. Although employees, under the recommended Order, will be reimbursed for their loss of pay, with interest, one cannot gauge whether that remedy in fact makes them whole. For more than 2 weeks, they were without pay. For the greater portion of that period, they had no idea whether their jobs had been completely lost. The employees are unlikely to forget this most unfortunate occurrence, and Respondent's renewal of its threats after the layoff and the subsequent discharge of Krull make it likely that Respondent's misconduct will continue. *Grandee Beer Distributors, Inc.* v. *N.L.R.B.*, 630 F.2d 928, 934 (2d Cir. 1980).

Respondent, however, contends that a bargaining order is inappropriate herein because only 5 of the original 14 signatories and 11 of the 23 employees were employed by Respondent at the time of the hearing. With the addition of Krull, whom I shall order to be reinstated, the numbers will be altered some what. In any event, Respondent contends that the employee turnover is important to consider in determining whether a bargaining order should issue, although it recognizes that the Board does not consider it. See, e.g., *General Stencils, Inc.*, 195 NLRB 1109, 1111, fn. 7 (1972). With the reinstatement of Krull, a majority of the original employee complement remains; and it cannot be said that, but for the illegal layoff, additional employees would not still be on Respondent's payroll. For example, Hungerford and a busboy never returned to work after August 16. If Respondent's argument were accepted, Respondent would benefit from its own unfair labor practices, clearly not a result which effectuates the policies of the Act.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section II, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to labor disputes burdening and obstructing commerce and the free flow thereof.

ADDITIONAL CONCLUSIONS OF LAW

1. By refusing to bargain with the Union since August 13, 1980, and by unilaterally increasing wages and eliminating benefits, Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act.

2. By interrogating its employees concerning their sympathies for and activities on behalf of the Union and concerning the sympathies and activities of other employees; by threatening its employees with loss of jobs, closure of its facility, and unspecified reprisals to induce them to abandon their support for the Union and to circulate antiunion petitions; by impliedly support for the Union and to circulate antiunion petitions; by impliedly promising its employees resolution of their grievances and increase of benefits if they would abandon their support of the Union and would circulate and sign antiunion petitions; and by threatening to inflict and inflicting bodily injury on its employees, Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

3. By closing its facility and laying off its employees and by discharging Vladimir Krull for engaging in union activities and for joining and assisting the Union, Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) of the Act.

4. All of these unfair labor practices burden and obstruct commerce and the free flow thereof within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act in any other manner.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it cease and desist therefrom, post an appropriate notice in both English and Spanish, and take certain affirmative action designed to effectuate the purposes and policies of the Act, including, in addition to the bargaining order referred to, *supra*, an order requiring Respondent to rescind the unilateral wage increase it gave to its cooks, upon request.

Additionally, I shall recommend that Respondent be ordered to offer Vladimir Krull reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges previously enjoyed, dismissing, if necessary, a replacement employee, and make him whole for any loss of earnings he may have suffered by reason of his discharge on September 16, 1980, by paying him a sum of money equal to that which he normally would have earned absent the discharge, less earnings during such period, with interest thereon, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[21] I shall also recommend that Respondent be required to make whole all of its employees who were laid off from August 16 to September 3, 1980, for any loss of earnings they may have suffered, to be computed in the manner set forth above.

[20] Respondent's bargaining obligation arose as of August 13, 1980, the date that the Union's mailgram demand for recognition was received by Respondent. *Cas Walker's Cash Stores, Inc.*, 249 NLRB 316 (1980).

[21] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the above findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[22]

The Respondent S.M.C. Rest. Corp. d/b/a Poletti's Restaurant, New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively and in good faith concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 6, International Federation of Health Professionals, ILA, AFL-CIO, as the exclusive representative of its employees in the following unit appropriate for the purposes of collective bargaining:

> All full-time and regular part-time waiters, busboys, bartenders, cooks, salad people, general kitchen help, dishwashers, and porters employed by Respondent at its facility, but excluding all other employees, guards, and supervisors as defined in the Act.

(b) Threatening its employees with loss of jobs, closure of its facility, and unspecified reprisals to induce them to abandon their support for the Union and to circulate and sign antiunion petitions.

(c) Interrogating its employees concerning their sympathies for and activities on behalf of the Union and concerning the sympathies and activities of other employees.

(d) Impliedly promising its employees resolution of their grievances and increase of benefits if they would abandon their support of the Union and would circulate and sign antiunion petitions.

(e) Closing its facility and laying off its employees, in order to discourage their support of the Union.

(f) Eliminating work-related benefits previously enjoyed by its employees, in order to discourage their support of the Union.

(g) Granting certain of its employees increased wages, in order to discourage their support of the Union.

(h) Threatening to inflict, and inflicting, bodily injury on its employees, in order to discourage their support of the Union.

(i) Discharging its employees because they joined, supported, and assisted the Union and in order to discourage the membership in, support, and assistance of the Union by its other employees.

(j) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request of the Union, bargain collectively with it as the exclusive collective-bargaining representative of Respondent's employees in the above-described appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request of the Union, rescind the unilateral increases of wages granted to certain of its employees and provide its employees with free desserts, as Respondent previously did.

(c) Offer Vladimir Krull immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges previously enjoyed, dismissing, if necessary, a replacement employee, and make him whole for any loss of earnings he suffered by reason of the discrimination against him from September 16, 1980, with interest thereon, to be computed as described in the section of this Decision entitled "The Remedy."

(d) Make whole all employees who were laid off by Respondent from August 16 to September 3, 1980, for any loss of earnings suffered by reason of the discrimination against them, with interest thereon, to be computed as described in the section of this Decision entitled "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its New York, New York, place of business copies of the attached notice marked "Appendix."[23] Copies of said notice in both English and Spanish, on forms provided by the Regional Director for Region 2, after being duly signed by a representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act other than those found herein.

[22] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[23] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to bargain collectively and in good faith concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 6, International Federation of Health Professionals, ILA, AFL-CIO, as the exclusive representative of our employees in the following unit appropriate for the purposes of collective bargaining:

All full-time and regular part-time waiters, busboys, bartenders, cooks, salad people, general kitchen help, dishwashers, and porters employed by Respondent at its facility, but excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT threaten our employees with loss of jobs, closure of our facility, and unspecified reprisals to induce them to abandon their support for the Union and to circulate and sign antiunion petitions.

WE WILL NOT interrogate our employees concerning their sympathies for and activities on behalf of the Union and concerning the sympathies and activities of other employees.

WE WILL NOT impliedly promise our employees resolution of their grievances and increase of benefits if they would abandon their support of the Union and would circulate and sign antiunion petitions.

WE WILL NOT close our facility and lay off our employees, in order to discourage their support of the Union.

WE WILL NOT eliminate work-related benefits previously enjoyed by our employees, in order to discourage their support of the Union.

WE WILL NOT grant certain of our employees increased wages, in order to discourage their support of the Union.

WE WILL NOT threaten to inflict and inflict bodily injury on our employees, in order to discourage their support of the Union.

WE WILL NOT discharge our employees because they joined, supported, and assisted the Union and in order to discourage the membership in, support, and assistance of the Union by our other employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request of the Union, bargain collectively with it as the exclusive collective-bargaining representative of our employees in the above-described appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, upon request of the Union, rescind the unilateral increases of wages granted to certain of its employees and provide employees with free desserts, as we previously did.

WE WILL offer Vladimir Krull immediate and full reinstatement to his former position, without prejudice to his seniority and other rights and privileges previously enjoyed, dismissing, if necessary, a replacement employee, and make him whole for any loss of earnings he suffered by reason of our discrimination against him from September 16, 1980, with interest.

WE WILL make whole all our employees who were laid off by us from August 16 to September 3, 1980, for any loss of earnings suffered by reason of our discrimination against them, with interest.

S.M.C. REST. CORP. D/B/A POLETTI'S RESTAURANT